No. 11200

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a corporation, and LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation,

Appellants,

vs.

W. L. OLIVE,

Appellee.

ANSWER BRIEF OF APPELLEE

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Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D., 1946.

.....

Of Counsel for Appellants.

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The statement of the case (Appellants' Opening Brief, pages 1 to 3) is conceded to be correct.

CRITICISM of APPELLANTS' STATEMENT of FACTS

At page 6 of Appellants' Brief, it is said:

> "It is also conceded that on May 4, 1935, the Railroad made a settlement with Appellee, paying to Appellee the sum of $5,000.00, and that in consideration for this payment, Appellee executed a release of all claims for personal injuries, loss of services, and medical and other expenses arising from the accident."

The inference might be drawn from the quoted statement above that the release referred to (Defendant's Exhibit "G", Rec p 141) was in effect a release for future time lost, or time lost after the date of the release. Such an inference would be incorrect. This release in effect released Appellants for all things therein mentioned to the date of the release, May 4, 1935. The action is for loss of time subsequent to Aug. 20, 1936, as a result of wrongful discharge.

STATEMENT OF FACTS

W. L. Olive brought this action to recover damages for his wrongful discharge, which occurred August 20, 1936, and loss of time and wages resulting therefrom. At the time of his discharge, he was approximately 35 years of age. He started to work for the Appellant, Union Pacific Railroad Company, when he was 16 years of age at Pocatello, Idaho, and, except for a brief period in the early 1920's, he was in the service of one or the other of the Appellants until his wrongful discharge on August 20, 1936. On the 25th day of February, 1934, while employed by Appellant at its Las Vegas yard, in the course of his employment he fell from a car, suffering injuries which kept him out of the service for a period of time. Thereafter, and on May 4, 1935, he accepted a settlement for injuries received and time lost up to May 4, 1935 (Defendant's Exhibit "G", Rec p 141). Olive was on continuous leave of absence up to May 25, 1936 (Rec p 61).

Thereafter, Olive repeatedly reported back for employment, even though he had been found qualified physically by the Appellant's doctors and his own private doctor. He was refused employment and, finally on August 20, 1936, he was notified by Maydahl, the car foreman, in writing, that he could not return to work (Rec p 60).

At the time of his discharge, Appellants and Appellee were operating under a collective bargaining agreement entered into on November 1, 1934 (Appellee's Exhibit 2), the original of which was forwarded to this Court pursuant to Rule 75 (i) for inspection. This agreement provided, among other things, as follows:

"Rule 37. No employe shall be disciplined

without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employe will be apprised of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

"Rule 38. No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, neither shall an employe be discharged for any cause without first being given an investigation."

In violation of this agreement, Olive was summarily dismissed from the service without a hearing before or after the dismissal, or at all.

An action was brought by the Appellee for the breach of this contract and resulting loss of pay, resulting in a verdict in favor of the plaintiff in the sum of $8,675.40, from which verdict this Appeal was taken.

The questions involved in this Appeal are presented by Appellants by 2 points. They will be answered in the order presented.

POINT ONE

"The United States District Court erred in holding that Appellee's cause of action was not barred by the four year Statute of Limitations, and, accordingly in sustaining Appellee's Motion to Strike the Third Defense of Appellant's Answer, setting up the four year Statute of Limitations in bar."

DISCUSSION OF APPELLANTS' POINT ONE

The only question is whether or not the contract of November 1, 1934 (Appellee's Exhibit 2), transmitted in its entirety to this Court for inspection, is a written contract within the purview of Sec. 8524, N. C. L. 1929.

The Court's attention is respectfully invited to Appellee's Exhibit 2, the contract of employment. It will be observed that this document is designated (inside cover page) "Agreement Between the Union Pacific System Lines Comprised of * * *" (naming, among others, the Appellants) "and all that class of employes represented by System Federation No. 105, Railway Employes' Department, A. F. of L., Mechanical Section No. 1 Thereof". Then follows the six brotherhoods, including "Brotherhood of Railway Carmen of America", of which Appellee was a member.

It will be observed that this agreement covers 46 printed pages. Within its pages are found provisions, in minute detail, covering practically every matter and thing concerning employer and employee that might arise in the course of employment. For instance, hours of service; overtime; Sunday and holiday work; emergency service; road work; temporary vacancies; assigned road work; filling vacancies; reward for long and faithful service; absence from work; treatment when required to attend Court; paying off; method in

reducing forces; seniority rights; assignment of work; filling temporary foremanships; handling grievances; treatment of Union committees; requirements of apprentices; apprentice services; application for employment; shop conditions; personal injuries; maintaining bulletin board; free transportation of employees; rules for safeguarding and protecting employees; helpers; lead workmen; special rules for boiler makers; machinists' special rules; sheet metal workers special rules; electrical workers special rules; carmen's special rules; rates of pay, and general working conditions.

Thus, it is seen that practically every contingency growing out of employment, or likely to arise in the employment, is provided for.

It is conceded by all parties that this agreement was entered into by the authorized agents of employer and employee.

Furthermore, this is admitted by Appellant to be a written agreement because, in the Statement of Facts (page 4 of Brief), counsel states:

> "On November 1, 1934, while the Appellee was so employed, the Railroad and the Brotherhood of Railway Carmen of America, a labor organization of which Appellee was a member and which was the recognized bargaining agent for the craft or class to which Appellee belonged, entered into an agreement in writing, setting forth the rights and duties of the Railroad and its employees of Appellee's craft or class collectively with respect to rates of pay, rules, and working conditions. * * *"

And again at page 11 of his Brief, counsel states:

> "Let us state at the outset that we do not question the validity of collective bargaining agreements in general, nor of the agreement of Novem-

> ber 1, 1934, in particular, nor do we doubt that in an appropriate case such agreements may be enforced by the individual employees who are members of the contracting union and who, by express or implied ratification of such agreement, have become entitled to assert rights thereunder. * * *"

This type of contract has not only received the blessings of Congress, but is compelled by the express provisions of Statutes of the United States.

Subdivision First, Section 152, Title 45, USCA (Railway Labor Act), provides:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreement or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Under the provisions of Suddivision (5) of Section 158, Title 29, USCA (National Labor Relations Act), it is unlawful for the employer to refuse to bargain collectively with the representatives of his employees. The following are some of the views expressed by Courts construing the latter cited statute:

Under this chapter, employer's refusal to sign a written contract embodying terms of agreement reached with union was a "refusal to bargain collectively" and an "unfair labor practice", and National Labor Relations Board could require employer at the request of the union to sign a written contract embody-

ing the agreed terms. **H. J. Heinz Co. v. National Labor Relations Board, 1941,** 61 S Ct 320, 311 US 514, 85 L Ed 309, affirming, CCA, 110, F2d 843, certiorari granted, 1940, 60 S Ct 1102, 310 US 621, 84 L Ed 1394.

Where employer and union representing a majority of employees in appropriate unit were in substantial agreement on a number of union demands, employer's refusal to embody any points of agreement in a written contract constituted a "refusal to bargain collectively" within prohibition of this section. **Bethlehem Shipbuilding Corporation Limited v. National Labor Relations Board,** CCA, 1940, 114 F 2d 930, certiorari dismissed, 1942, 61 S Ct 448, 312 US 710, 85 L Ed 1141.

Where an oral agreement between an employer and its employees is reached, the parties must embody the agreement in a written contract as a mutual guaranty of conduct, and an employer's refusal to unite in a contract embodying such an oral agreement amounts to a failure to comply with this chapter. **Continental Oil Co. v. National Labor Relations Board,** CCA, 1940, 113 F 2d 473, certiorari granted, 1941, 61 S Ct 72, 85 L Ed 406.

The provision of this section stating that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, requires an employer to embody terms agreed upon with such a representative in a written contract. **H. J. Heinz Co. v. National Labor Relations Board,** CCA, 1940, 110 F 2d 843, certiorari granted, 1940, 60 S Ct 1102, 310 US 621, 84 L Ed 1394, affirmed, 1941, 61 S Ct 320, 311 US 514, 85 L Ed 309.

A refusal of employer to put an oral agreement with employees in writing constitutes a refusal to "bargain collectively" within meaning of this chapter. **National**

Labor Relations Board v. Highland Park Mfg. Co., CCA 1940, 110 F 2d 632.

An employer's refusal to put in writing the terms of any oral agreement with employees constitutes a refusal to "bargain collectively" within this section. **Arts Metals Const. Co. v. National Labor Relations Board,** CCA 1940, 110 F 2d 148.

Under the title: "Refusal To Bargain Collectively", following the above cited section, commencing at page 195, Title 29, USCA, are found many cases too numerous to cite, of similar import.

It is true that there was some confusion in the initial concept of this type of contract; some of the early courts holding that the contract was merely a standard by which the contracting parties would be guided. However, that theory has long since been rejected by the majority of courts.

At 95 ALR 10, under the annotation entitled "Collective Labor Agreements", there appears a comprehensive note dealing with numerous phases of collective labor agreements. Under this note, at page 15, the author states the modern rule as follows:

> "While many theoretical questions have been raised by the text-writers as to the nature and status of a collective labor agreement between a labor union, which is usually unincorporated, and an employer, or an association of employers, likewise as a general rule unincorporated, the courts seem to have had no difficulty in recognizing such status to be of a contractual nature, and in applying thereto, particularly in equity, the principles of the law of contracts."

The view expressed by Appellee has been stated by the Courts in various language, some of which follows:

Thus, in **Harper v. Local Union,** I. B. E. W. (1932; Tex. Civ. App.) 48 S. W. (2d) 1033, the court said:

> "The general trend of decisions has been to recognize collective bargaining agreements, when fairly made and for the lawful purpose of securing employment, shorter working hours, and better working conditions. When so made such agreements are generally held to be in the public interest, as offering peaceful solutions of labor disputes and preventing strikes and lockouts and incidental loss arising from unemployment and violence. These agreements are now regarded as primarily for the benefit of the members of the union, and under a variety of theories have been held to be enforceable by the members. Some courts have held that the contracts establish usages or customs of trade; a distinction being

sometimes drawn between usage and custom. Other courts, holding that the association acts for its members, have applied the general principles of agency, while still others * * * treat the agreement as one made for the benefit of third parties. * * * Aside from those aspects of the agreement which give rise to legal rights in favor of the individual members of the union, as such, who have brought themselves within its purview, the collective agreement is now treated in a number of jurisdictions as a contract also between the organization or group as such and the employer. * * * While the decisions are by no means uniform in many respects, upon specific questions that have arisen, generally speaking, the courts have sought to apply the recognized principles of contract law to collective bargaining agreements."

In **Foss v. Portland Terminal Co.** (1923; C. C. A. 1st) 287 F. 33 (reversing (1922; D. C.) 283 F. 204), the question being the right under the Clayton Act to an injunction against a strike, it appeared that the agreement involved was entered into between the plaintiff railroad company and its employees acting through their brotherhood, and, while refusing an injunction, the court referred to the agreement as a contract.

And the validity and the contractual nature of an agreement between a union and a railroad company governing wages and regulations of employment of yardmen was impliedly recognized in **Iowa Transfer Co. v. Switchmen's Union of N. A.** (1933; C. C. A. 8th) 66 F. (2d) 909, which involved the sufficiency of an award of arbitrators under the Railway Labor Act.

In **New England Wood Heel Co. v. Nolan** (1929)

268 Mass. 191, 167 N. E. 323, 66 A. L. R. 1079, in holding that a strike against an employer who had refused to renew an agreement with a union was not justified as an attempt to prevent recalcitrant union members from demoralizing the entire personnel of the union by working for a less rate than they themselves participated in adopting as proper, to prevent the employer from aiding and abetting those members in carrying out that design, or to compel the employer to restore to the union members the standard union rates, the court referred to the expired agreement for a closed shop as a "working agreement".

In **Reihing v. Local Union,** I. B. E. W. (1920) 94 N. J. L. 240, 109 A. 367, an agreement between a labor union and certain employers was said to be a written understanding or collective bargaining agreement, expressing the terms and conditions of the employment for a given period of time, and providing that the employers should employ only union men.

The contractual nature of a closed shop agreement was also recognized in **Stillwell Theatre v. Kaplan** (1932) 259 N. Y. 405, 182 N. E. 63, 84 A. L. R. 6.

The case of **Rentschler v. Missouri-Pacific Railroad Company** (Neb) 253 N. W. 694, cited and quoted at length by Appellant as sustaining his contention, does not express a view contrary to the contention of the Appellee. In this case, it was held that a collective labor agreement is a general offer that becomes a binding contract when it is adopted into and made a part of the individual contract of each employee, in which case a breach of its terms will give rise to a cause of action by either party. The taking of employment with knowledge of the terms of the agreement seems to constitute sufficient evidence of the adoption of

the agreement.

Views similar to the foregoing have been expressed in numerous other cases, some of which are as follows:

Again, in **Yazoo & M. Valley R. Co. v. Webb** (1933; CCA 5th) 65 F 2d 902, it was said that a collective labor agreement between the managers of an industry and its employees is a mutual general offer to be closed by specific acceptances, and that when negotiated by representatives of an organization it is called "collective bargaining", but that ordinarily the laws of the organization which constitute the authority of the representatives to act do not require the individual members to serve under it, but only that if they serve they will do so under its terms, and will join in maintaining them as applied to others.

In referring to a so-called agreement entered into by a number of proprietors of restaurants, the representative of a union, and a government labor representative, regulating the hours of labor, the scale of wages, and the working conditions of restaurant employees, appearing in the form of a letter, signed by the proprietors, expressly stating that the employers were unwilling to enter into any agreement or contractual relations with the union, the chancellor, in **Sarros v. Nouris** (1927), 15th Del. Ch. 391, 138 A. 607, said:

> "Though not an agreement in point of form, yet it was meant to be one in point of fact between the employers and the employees, was so regarded by everybody in interest, and was recognized by the complainants as well as their employees as binding. I therefore shall regard it, as did the complainants, as an expression of obligations which were binding upon them and the faithful

keeping of which the employees were entitled to expect."

Employees who continued working at a lower scale of wages than the scale prevailing in the locality from which their employer came, pursuant to an agreement to that effect between their union and the employer, who further agreed therein that in case the union's requirements of the payment of the higher scale should be upheld in the courts, it would pay the difference to such employees, were held in **Glicman v. Barker Painting Co.** (1930) 227 App. Div. 585, 238 N. Y. S. 419, to be entitled to recover the amount due thereunder.

In **McGregor v. Louisville & N. R. Co.** (1932) 244 Ky. 696, 51 S. W. (2d) 953, in holding that the seniority rights of a railroad telegrapher must be determined by the terms of the contract in force at the time when he transferred from the telegraphic department to another department, the court referred to the agreements involved as "contracts made by the railroad with its telegraphic employees as a result of collective bargaining."

In **Cross Mountain Coal Co. v. Ault** (1928) 157 Tenn. 461, 9 S. W. (2d) 692, it was held that the legal effect of a collective labor agreement between coal operators and the representatives of the coal miners, in the absence of any express contract between the individual employee and his employer inconsistent with its terms, was to make it the basis of the contract of employment between each operator accepting it and each of his employees who entered or continued in the service and employment of such employer with knowledge of its existence. And see **Harper v. Local Union,** I. B. E. W. (1932; Tex. Civ. App.) 48 S. W. (2d) 1033.

In **Gregg v. Starks** (1920) 188 Ky. 834, 224 S. W. 459, while the contract involved resulted from collective bargaining between the railroad company and a conductors' union, it purported on its face to be an agreement with all of the company's conductors, and it was held that the mere circumstances of its negotiation could not exclude other conductors, not members of the organization, from its benefits, when the nonmember conductors and the railroad company recognized and treated it as the contract under which the services of such conductors were rendered and accepted, and hence that a conductor who was not a member of the negotiating union could enjoin a breach of the seniority provisions therein.

In holding a written contract between a railroad brotherhood and a railroad management, prescribing a schedule of wages and rules for trainmen, applicable to all trainmen in the railroad's employ, regardless of membership in the union or of color, but not to an employee, a passenger porter, not within the classification of trainmen, the court, in **Yazoo & M. Valley R. Co. vs. Webb** (1933; C. C. A. 5th) 65 F. (2d) 902, said that when such an agreement is not by its terms confined to members of the brotherhood, but purports to cover all employees in the industry of the class it deals with, and is thus published by the employer, nonmembers who continue in the employment, or who afterwards enter it, accept and adopt the agreement, and are, through the adoption, as fully bound and protected by it as is anyone else.

The Moore case, discussed at length by Appellants, when followed, is very interesting and factually is almost identical with the present case. An analysis of the Moore case shows that the effect of its holding is

diametrically opposed to the contention of Appellants. The following is a history of the Moore case:

The Moore case originated in the State courts of the State of Mississippi. There was a contract of employment involved practically identical with the one in this case and, as pointed out, the facts in the Moore case were substantially identical with those in this case. After trial in the State Court, the case went to the Supreme Court of the State of Mississippi (**Moore v. Illinois Central Railroad,** reported at 176 So. 593). The holding of the Supreme Court of Miississippi was (a) that a contract between railroad and trainmen's union, which included wage schedules, was valid and prevented railroad from discharging trainman at will, and member of union could sue thereon, though he himself had not agreed to work for railroad for any definite time, and (b) that plaintiff's action against railroad for damages for wrongful discharge contrary to contract between railroad and trainman's union was based on written contract with union rather than on verbal contract of employment, and hence was subject to six-year rather than to three-year Statute of Limitations. The trial court was reversed and the case remanded by the Supreme Court of Mississippi, and, upon being remanded, the complaint was amended to claim damages in the sum of $12,000.00. Thereupon, the case was transferred to the United States District Court for the Southern District of Mississippi, being reported at 24 F. Sup. 731. The District Court of the United States held that:

> "A contract between railroad company and trainmen's union as to pay, seniority, and discharge of trainmen employed by company was valid, so as to authorize action by union member

> against company for alleged breach of contract by arbitrarily discharging plaintiff without just cause, though he was not direct part to the contract, except as made so thereby for his benefit."

and, in effect, followed the Mississippi Supreme Court in its holding to the effect that the contract was a written contract and not oral.

Subsequently, the case was carried from the United States District Court to the Circuit Court of Appeals of the Fifth Circuit (**Illinois Central R. Co. v. Moore,** 112 F. 2d 959). The Circuit Court of Appeals entered the following judgment:

> "The judgment is reversed because of error in striking the plea of three years' limitation, and the cause is remanded for further proceedings not inconsistent with this opinion."

At page 18, et cetera, of Appellant's Brief, an extensive discussion is found of the case of **Illinois Central Railroad v. Moore,** 112 F (2d) 959, and the view of the same taken by the Circuit Court of Appeals of the Fifth Circuit. He quotes from this case extensively, but later concedes that the Fifth Circuit Court was reversed by the Supreme Court of the United States upon the ground that the Circuit Court of the Fifth Circuit failed to follow the interpretation given the Statute of Limitations by the Supreme Court of Mississippi.

Counsel, with the material found in the Circuit Court's opinion in the Moore case, builds a colossal and beautiful snow man, which is as completely destroyed by the decision of the United States Supreme Court as if the same had never existed except in his imagination. By force of the decision of the Supreme Court, the snow man exists in memory only. He was

a great snow man while he lived, but he has been completely destroyed by the opinion of the Supreme Court of the United States in **Moore v. Illinois Central Railroad Company,** 85 L. Ed. 1089, in which it was held, at page 1091 as follows:

> "Petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against respondent railroad company in a Mississippi State Court, claiming that he had been wrongfully discharged contrary to the terms of a contract between the Trainmen and the railroad, a copy of the contract being attached to the complaint as an exhibit. Petitioner alleged that as a member of the Trainmen he was entitled to all the benefits of the contract. Judgment on the pleadings was rendered against Moore by the trial court. Upon appeal the Mississippi Supreme Court reversed and remanded. One of the railroad's pleas was that the contract of employment between Moore and the railroad was verbal, rather than written, and that any action thereon was therefore barred by the three-year statute of limitations provided by No. 2299 of the Mississippi Code of 1930. With reference to this plea the Mississippi Supreme Court said: 'The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, No. 2299, Code of 1930, has no application, and the time within which appellant could sue is six years under No. 2292, Code of 1930.' **Moore v. Illinois C. R. Co.** supra (180 Miss 291, 176 So 593).

After the remand by the Mississippi Supreme Court, Moore amended his bill to ask damages in excess of $3,000, and the railroad removed the case to the federal courts. The District Court considering itself bound by state law, held that the Mississippi three-year statute of limitations did not apply, but on this point the Circuit Court of Appeals reversed, declining to follow the Mississippi Supreme Court's ruling. Calling attention to the fact that the Mississippi Supreme Court does not regard itself as bound by a decision upon a second appeal, the Circuit Court of Appeals (one judge dissenting) said: 'Since the removal of the case to the federal court this court stands in the place of the Supreme Court of Mississippi and with the same power of reconsideration.' But the circuit court of appeals do not have the same power to reconsider interpretations of state law by state courts as do the highest courts of the state in which a decision has been rendered. The Mississippi Supreme Court had the power to reconsider and overrule its former interpretation, but the court below did not. And in the absence of a change by the Mississippi legislature, the court below could reconsider and depart from the ruling of the highest court of Mississippi on Mississippi's statute of limitations only to the extent, if any, that examination of the later opinions of the Mississippi Supreme Court showed that it had changed its earlier interpretation of the effect of the Mississippi statute. **Wichita Royalty Co. v. City Nat. Bank,** 306 US 103, 107, 83 L ed 515, 517, 59 S Ct 420; cf. **West v. American Teleph. & Teleg. Co.** No. 44 this Term (311 US

223, ante, 139, 61 S Ct 179, 132 ALR 956); **Fidelity Union Trust Co. v. Field,** No. 32 this Term (311 US 169, ante, 109, 61 S Ct 176). But the court below did not rely upon any change brought about by the Mississippi legislature or the Mississippi Supreme Court. On the contrary, it concluded that it should re-examine the law because there was involved the interpretation and application of a collective contract of an interstate railroad with its employees. The court below also based its failure to follow the Mississippi Supreme Court's decision in Moore's case on the ground that in an earlier case the Mississippi Supreme Court had said that the three-year statute applied unless a contract was 'wholly provable in writing', a situation which the court below did not think existed here. But even before the decision in **Erie R. Co. v. Tompkins,** 304 US 64, 82 L ed 1188, 58 S Ct 817, 114 ALR 1487, the federal courts applied state statutes of limitations in accordance with the interpretations given to such statutes by the states' highest courts. As early as 1893, this Court said: 'The construction given to a statute (of limitations) of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications.' It was error for the court below to depart from the Mississippi Supreme Court's interpretation of the state statute of limitations."

In the case of **Davis, Director General of Railroads, v. Rush** (Tex) 288 SW 405, it was held that a contract similar to the one in question in this case was a written contract and enforceable by the employee as such.

It is contended (Appellant's Brief, p 28, et cetera) that the contract in question was partially provable by parole, making the contract an oral contract instead of a written contract, in that the Appellee contended that his employment was for life.

The answer to this contention is found in the Public Statutes of the United States. Reading the same in connection with the contract itself, it appears in Rule 37 (Appellee's Exhibit 2) that:

> "Rule 37. No employe shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employee will be apprised of the precise charge against him. The employee shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If it is found that an employee has been unjustly suspended or dismissed from the service; such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

And Rule 38 of said Exhibit provides as follows:

> "Rule 38. No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, neither shall an employee be discharged

for any cause without first being given an investigation."

The Act relating to retirement of railroad employees, (Section 228b, Title 45, USCA) provides as follows:

"No. 228b. Eligibility for annuities; time of accrual.

(a) The following-described individuals, if they shall have been employees on or after the enactment date, shall, subject to the conditions set forth in subsections (b), (c), and (d), be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 228a (a) (but with the right to engage in other employment to the extent not prohibited by subsection (d):

1. Individuals who on or after the enactment date shall be sixty-five years of age or over.

2. Individuals who on or after the enactment date shall be sixty years of age or over and (a) either have completed thirty years of service or (b) have become totally and permanently disabled for regular employment for hire, but the annuity of such individuals shall be reduced one one-hundred-and-eighth for each calendar month that they are under age sixty-five when the annuity begins to accrue.

3. Individuals, without regard to age, who on or after the enactment date are totally and permanently disabled for regular employment for hire and shall have completed thirty years of service.

Such satisfactory proof of the permanent total

disability and of the continuance of such disability until age sixty-five shall be made from time to time as may be prescribed by the Board. If the individual fails to comply with the requirements prescribed by the Board as to proof of the disability or the continuance of the disability until age sixty-five, his right to an annuity under subdivision 2 or subdivision 3 of this subsection by reason of such disability shall, except for good cause shown to the Board, cease, but without prejudice to his rights under subdivision 1 or 2 (a) of this subsection. If, prior to attaining age sixty-five, such an individual recovers and is no longer disabled for regular employment for hire, his annuity shall cease upon the last day of the month in which he so recovers and if after such recovery the individual is granted an annuity under subdivision 1 or 2 (a) of this subsection, the amount of such annuity shall be reduced on an actuarial basis to be determined by the Board so as to compensate for the annuity previously received under this subdivision.

(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; but this requirement shall not apply to the individuals mentioned in subdivision 2 (b) and subdivision 3 of subsection (a) prior to attaining age sixty-five.

(c) An annuity shall begin to accrue as of a date to be specified in a written application (to be made in such manner and form as may be prescribed by the Board and to be signed by the

individual entitled thereto), but—

(1) not before the date following the last day of compensated service of the applicant, and

(2) not more than sixty days before the filing of the application.

(d) No annuity shall be paid with respect to any month in which an individual in receipt of an annuity hereunder shall render compensated service to an employer or to the last person by whom he was employed prior to the date on which the annuity began to accrue. Individuals receiving annuities shall report to the Board immediately all such compensated service. Aug. 29, 1935, c. 812, No. 2, as amended June 24, 1937, c. 382, Part 1, No. 1, 50 Stat. 309.

Thus, it is seen from the Agreement itself (Rules 37 and 38 quoted above) that the employee may not be discharged or suspended without a hearing, and he may not be dismissed without fault on his part justifying such dismissal; and, if he is dismissed or suspended unjustly, he shall be reeinstated with his seniority rights unimpaired, and compensated for the wage loss if any resulting from suspension or dismissal. He may not be dismissed for incompetency where he has been in the service 90 days, nor shall he be dismissed for any cause without first being given an investigation. There is no contention by Appellant that the employee was given an investigation or a hearing in this case. And even after his work is done, he is entitled to a pension (Section 228b, Title 45, USCA, above).

We, therefore, respectfully submit, as to Appellant's Point One, that the contract herein sued upon is a written contract and the six-year Statute of Limitations

is applicable.

DISCUSSION OF APPELLANTS' POINT TWO

"POINT TWO

> The verdict for appellee is not supported by the evidence, is contrary to the evidence, and so plainly excessive in the amount of damages awarded as to indicate that it was influenced by passion or prejudice."

It is said in Appellant's Brief at page 33:

> "The principal point at issue, however, is whether or not the evidence shows that Appellants offered, in good faith, to return Appellee to work without prejudice, either on, or at some time prior to October 31, 1938. * * *"

In order to clarify this point, it will be necessary to review the record at length.

It will be noted that Appellee was on regular leaves from his employment to May 25, 1936 (R 61-68). That, on October 20, 1936, Olive was advised that he could not return to service (R 60), and we see from the record that he was never given a hearing (R 74). We quote:

> "Q. Mr. Olive, I will ask you if prior to your discharge, were you ever advised by the railroad, or any of its officers, of any charge pending against you?
>
> A. No, sir.
>
> Q. Were you ever given an opportunity to present in your behalf witnesses?
>
> A. No, sir.
>
> Q. Were you ever given an opportunity to appear before any investigating committee or board by counsel?
>
> A. No, sir.

Q. Have you received any compensation from the railroad for services or at all since this said dismissal?

A. No, sir.

Q. Was any investigation, so far as you know, held relating to the subject of your discharge?

A. No, sir.

Q. After your discharge did you report the matter to the Local Committee of the Union?

A. Yes, sir.

Q. Do you know what disposition was made of that, if any?

A. Well, failing to obtain any satisfaction myself, I turned it over to the Joint Protective Board Committee to see what they could do.

Q. And when was that, if you recall?

A. With permission, I will have to look at the date.

Q. Will you refresh your memory if you can?

A. It was about November, 1936, I think.

Q. But after the discharge?

A. I am not certain. I think that is about right, November, '36." (R 74-75).

It appears that there is a conflict in the testimony, but this is more imaginary than real when we analyze the record.

After Olive's injury, he first reported back to work on December 18, 1935, and repeatedly reported back thereafter. The stock excuse for not restoring him was for medical reasons. In the words of the witness:

"Q. Did you go back later?

A. I did.

Q. When was that?

A. At various times.

* * * *

A. There were so many dates that I can't remember them all, * * * . (R 48-49).

But during this period, Appellee was examined numerous times by the Railroad physician and found qualified for duty. On January 3, 1935, the Chief Surgeon at Salt Lake City examined the Appellee (R 49). On October 8, 1935, Dr. Landberger, the Chief Surgeon at Salt Lake City, again examined Appellee and found him qualified for live track duty. In May, 1936, he was examined by Dr. Slavin, the local Railroad doctor, and told by Dr. Slavin that he would recommend him as "a borderline case." (R 51-52). On October 22, 1937, he was examined by Dr. Schuler Fagen, who was then the Chief Surgeon of the System, who passed him for live track duty (R52). On May 23, 1936, he was examined by Dr. Balcolm, his own personal physician. At that time, Dr. Balcolm found Appellee in normal health, with a blood pressure of 130/100; that his heart was normal and sound, and that he was physically qualified for any character of physical exertion. In November, 1936, he was examined by Dr. Brown, a medical officer of the Appellant, and passed for live track duty. And the last and final examination (R 52) was on May 27, 1938, by the Union Pacific medical staff in Los Angeles, in the presence of witnesses of the BRC of America; the Brotherhood having insisted that the Brotherhood have a representative present. This representative was Mr. Cryer. This latter examination came about as a result of negotiations had with the Brotherhood and Railroad representatives at Salt Lake City. The meeting of the Brotherhood repre-

sentatives and the Railroad officials at Salt Lake City was fixed as the latter part of May, 1938, and came as a result of negotiations there. It appears from the record that Mr. Knickerbocker never talked to Olive after October of 1936 (R 110). It appears that Mr. Eney, the then current representative, turned over the record of Olive's case to his successor, Mr. Knight, in the forepart of July, 1938. That, at that time, Eney was through with the case and had nothing further to do with it, and did nothing further excepting supply the two gratuitous letters quoted at pages 34 and 35 of Appellants' Brief. In other words, Eney was through, as he indicated in his letter of June 30, 1938, to Mr. Thurman (R 136).

It is contended that reinstatement was offered Olive without prejudice. The record demonstrates that at all times Olive exerted every effort to be restored to duty and adjust past wage differences later. The record also demonstrates that each offer at restoration to duty by the Company was contingent upon Olive's waiving any wage claim to the date of restoration. We quote the record:

> "Q. Now, I should like to take you back, Mr. Olive, to the time you first, after you were off during your sickness, that you returned and applied for employment. That was in December of 1935, wasn't it?
>
> A. Yes, sir.
>
> Q. What happened then?
>
> A. I was subject to what they call tossing duty, from one department to another, as I can see it.
>
> Q. I am afraid that is conclusion. Now will you tell what happened and what was said by the

railroad officials, when and who said it, who you talked with and what was said by you?

A. I talked with Maydahl, Berry and Knickerbocker. These were all railroad officials.

Q. Who was Maydahl?

A. Car foreman.

Q. Who was present during the conversation?

A. I believe just the two of us.

Q. And when was it?

A. That was December 18, 1935.

Q. Go ahead and tell what happened.

A. I asked each of them to return to work and each in turn would refer me to the medical department. Then if I took it up with the medical department they would refer me back to the mechanical department and I didn't accomplish anything, so there isn't anything I can tell you about it.

Q. Who was Berry?

A. Berry was the master mechanic.

Q. Where is his place?

A. On the line, I think. He travelled up and down.

Q. And did you talk to him about the same time?

A. Yes, sir.

Q. What did he say to you?

A. He referred me to the medical department.

Q. And did you talk to Mr. Knickerbocker?

A. Yes, sir.

Q. When was that?

A. That was shortly after I talked to Mr. Berry.

Q. Well, when did you talk to Mr. Berry?

Give us a date, if you can, as nearly as you can.

A. I couldn't give you an exact date.

Q. Well, be approximate.

A. About January, 1936.

Q. Who was Mr. Knickerbocker?

A. He is superintendent of motor power and machinery.

Q. And what did he do?

A. He referred me to the medical department.

Q. And did you speak to anyone else?

A. On quite a number of occasions.

Q. Who that was connected with the railroad company did you speak to?

A. The officials who were in charge. I saw each one of them as I could and on the dates that was convenient to them and those dates are confusing to me. I don't know the dates, but I contacted all the officials I could possibly contact and gained no results from them whatsoever.

Q. Did the company ever offer to return you to work?

A. No, but if I may make that a little more clear—I was offered to be reinstated if I would waive all claim for back pay, which I figured was due me.

Q. When was that offer made?

A. That was made by Mr. Norton, who was superintendent of motor power and machinery.

Q. Do you remember the date?

A. I don't know." (R 54, 55, 56 & 57).

It is true that Mr. Burnett testified that at some indefinite place and time, Olive was offered reinstatement without prejudice. This was likewise testified to by Mr. Eney, the Brotherhood representative, but it is

indefinite as to time and place. The evidence conclusively shows that Mr. Eney never discussed the matter after July 30, 1938, because he turned the file and records over to his successor, Mr. Knight. There is no contention that Mr. Burnett, after that date, made any offer. It will be noted that the file was turned over to Knight by Eney immediately after the examination on May 27, 1938, in Los Angeles in the presence of the representatives of the Brotherhood; and it is interesting to note what transpired at that time. Here are Mr. Eney's words, as they appear in his telegram to Olive on May 30, 1938. We quote:

" 1938 May 30 AM 11 56
S25 25-Omaha Nebra 30 12 1 P
Willard L. Olive

Understand You Have Passed Examination. Ready to Restore You to Work Immediately on the Basis of No Compensation for Time Lost. Advise if You Concur.

THOMAS J. ENEY." (R 125)

Mr. Olive had recently appealed to Mr. Eney to get his case handled like other local cases were being handled; that is, let him return to work and the subject of time lost be discussed at the leisure of others concerned (Appellee's Exhibit 10, R 153), and we quote:

PLAINTIFFS' EXHIBIT NO. 10
No. 48
Telegram

Nite Letter to Thos. J. Eney to Los Angeles
April 30th, 1938.

You have not answered my last letter wherein I asked for a complete review of my case by the Grand Lodge.

Is it not possible to handle my case like other local cases are being handled and that is to let me

return to work and the subject of time lost discussed at the leisure of others concerned.

Answer return wire.

515 Carson." (R. 153)
W. L. OLIVE

And Mr. W. L. Thurmond, the local representative of the Brotherhood, had recently made a similar appeal to Mr. Eney, in his telegram of December 28, 1937, which we quote:

"Las Vegas Nevada December 28 1937

T J Eney
Rome Hotel
Omaha Nebraska

Norton Requested Conference With Local Committee Today Case W L Olive Stop Norton Willing Reinstate but Requested Signatures of Olive and Committeemen on Waiver of Wage Claim Stop Mr Olive Willing Make Some Concession on Wage Settlement Provided He is Returned Service Immediately Letter Following

W. L. THURMOND." (R 156-157)

But nothwithstanding all of these appeals, according to Mr. Eney, the General Chairman, all of these appeals were voices in the wilderness. They were heard by no one as demonstrated by Mr. Eney's letter of June 30, 1938 (Appellant's Exhibit 9, R 136), which we quote:

"Joint Protective Board, Union Pacific Railroad

"Joint Protective Board, Union Pacific Railroad
Brotherhood Railway Carmen of America.
Office of Thomas J. Eney, General Chairman,
1026 W. O. W. Building, Omaha, Nebr.

June 30, 1938.

W. L. Thurmond, Local Chairman

Local Lodge No. 612
226 South 6th Street
Las Vegas, Nevada
Dear Sir and Brother:

This will acknowledge receipt of your letter of June twenty-first with a copy to the executive board members in the case of W. L. Olive.

Management has refused reinstate W. L. Olive unless he withdraws claim for compensation. Therefore, the only alternative for me, is to place same in the hands of the Grand Lodge for their disposal to the adjustment board.

Fraternally yours,
THOMAS J. ENEY,
General Chairman, J.P.B." (R 136)

Does the foregoing indicate that the company offered to restore Olive without prejudice? Or does it show conclusively that Olive made every effort to return to duty subject to the adjustment of his wages at a later time?

It is true, as we have said, Mr. Burnett and Mr. Eney indicated in their testimony that at some indefinite time and place, such as offer had been made. They were relying upon their recollections, which were undoubtedly faulty after almost nine years, as against the expressions as indicated in the above Exhibits, made at a time when the transactions were immediately upon their minds. The jury accepted the views expressed by Mr. Eney in his written communications at the time, which they were amply justified in doing.

If Mr. Eney had intended in good faith to be helpful to the Court and jury in this cause, he undoubtedly would have brought the records of the case so as not to be uncertain in his testimony. His demeanor, as reflected by his recorded testimony, indicates that he

was much more anxious to defeat the claim of the Appellee than anything else, even at the sacrifice of accuracy. It will be noted that he was a witness for the Railroads in this case instead of the Appellee, but even in that frame of mind, Mr. Eney, being pressed on cross-examination, admitted that it was possible that the Company offered to reinstate Olive on the basis that Olive waive all compensation for time lost (R 116).

It is further urged under this Point that the verdict was "so plainly excessive in amount of damages awarded as to indicate that it was influenced by passion of prejudice."

Counsel for Appellants (R 81) fixed the rate of Olive's pay at the time of his dismissal from the service at 81½c per hour for eight hours per day, and fifty-six hours per week. In round figures, he was earning approximately $2300.00 a year. His claim was for loss of services from October 20, 1936, to the date of the verdict, March 26, 1945; a period of eight years and approximately five months; in round figures, slightly in excess of $20,000.00. As an offset against that, Olive admittedly earned, during the period he was out of service, approximately $900.00 a year, or roughly, $7500.00, netting a total loss of approximately $12,000.00, on the basis of pay which he was drawing at the time of his discharge. It further appears from the record that the wage scale increased during the time he was out of service, for it is stipulated (R 89) that in 1944 the scale of pay for like services was $1.09 per hour.

It will never be known how the exact figure contained in the verdict was reached. The record demonstrates that the Appellants got the best of the deal by a substantial margin.

CONCLUSION

The record does not reveal any prejudicial error. It does demonstrate conclusively that the Appellee in this case exhausted every means at his command to effect restoration to duty. It likewise demonstrates that the management consistently and repeatedly refused to restore him to duty unless he would waive claim for back wages, which he was entitled to under the agreement of employment.

We, therefore, respectfully submit that the verdict and judgment are fully sustained by the record, and should be affirmed.

Respectfully submitted,

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